Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-2100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself
and all others similarly situated,

Plaintiff-Petitioner,

v.

GROUP W CABLE, INC. and CITY OF NEW YORK,

Defendants-Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DIVISION, FIRST DEPARTMENT,
OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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Additional Question Presented

Whether an intervenor against which the plaintiff has not sought the imposition of substantive liability may be liable for fees under 42 U.S.C. § 1988?

(Issue raised by City and State Respondents. See Point IV A below.)

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A R G U M E N T

I. PETITIONER PREVAILED WITHIN THE MEANING OF 42 U.S.C. § 1988

Respondent's entire argument on this point rests on the fallacious premise that a remedy for obtaining constitutional just compensation has existed within New York's Executive Law § 828 from the beginning. Therefore, Respondents say, Petitioner could not have prevailed because she has never pursued the supposedly available remedy.

In fact, Petitioner's efforts created the previously non-existent administrative remedy for just compensation. When this case originally reached the United States Supreme Court, the New York Court of Appeals had declared that Section 828 did not require the payment of any compensation and merely permitted compensation or denial of compensation

in the absolute discretion of an administrative agency and not as a matter of constitutional right. 53 N.Y.2d 124, 138, 143, 440 N.Y.S.2d 843, 849, 852 (1981); see Petition pages 28-32.

Thus, when this Court determined that Petitioner had suffered a "taking" (458 U.S. 419), not only (1) had there been a taking but (2) Petitioner had already been denied just compensation as the Court of Appeals had ruled that Section 828 did not provide a remedy for obtaining just compensation.

Significantly, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), on which Respondents rely so heavily, expressly contemplates precisely such a situation as is presented here:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process

> "yield[s] just compensation," then the property owner "has no claim against the Government for a taking." * * * Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. (473 U.S. at 194-95; emphasis added)

Quite obviously, in Williamson County, the Court did not contemplate that the property owner would have to pursue a subsequently created administrative remedy in order to be deemed to have prevailed on a taking claim based on the absence of such a remedy.

Group W attempts to belittle Petitioner's role in causing the Commission's 60 day, no-notice statute of limitations to be declared invalid. But the Court of Appeals' declared that it was invalidating the subject regula-

tion as a result of this action. (A52-A53, A73-A74).

Respondents also suggest that the dismissal of Petitioner's complaint establishes that she did not prevail. (Group W Br. 29; A.G. Br. 4). The trial court, however, held the dismissal to be "merely a technical termination of the complaint wherein the 'just compensation burden' has been shifted to a state agency . . .." (A38). As Hewitt v. Helms, 482 U.S. ___, 107 S. Ct. 2672 (1987), stresses, it is the result that counts, not whether or not plaintiff has obtained a judgment. Here, Petitioner has gained significant results in establishing liability for herself and other property owners and voiding the Cable Commission's statute of limitations.

The City also suggests that this was not actually a Section 1983 action but solely an action in trespass (City Br. 28-30), notwithstanding the unreversed finding of the trial court that the action was brought to enforce federally-protected rights. (A35-A36). The City's unduly selective quotation from point headings in Appellant's Brief on remand to the Court of Appeals (City Br. 29-30) fails to note that Appellant's Complaint asserted "taking" grounds, her original appeal to this Court was entirely based on the taking issue, and, although on remand Appellant for tactical reasons stressed the trespass ground (on the premise that Section 828 was unconstitutional as a condemnation provision), she also devoted 16 pages of her Brief on Remand to arguing the measure of condemnation damages.

II. IMPOSING FEES ON GROUP W WILL NOT DEPRIVE IT OF PROPERTY WITHOUT DUE PROCESS

Group W's novel constitutional theory that imposing fees denies due process is utterly devoid of merit.

Under Section 1988, counsel fees are a component of costs. Hutto v. Finney, 437 U.S. 678, 695 ff. (1978), reh'g denied, 439 U.S. 1122 (1979). They are imposed as an incident of participating in litigation and without regard to fault.

This Court has held that due process is not violated by a state statute which imposes attorneys' fees against a life insurance company if it fails to pay policy benefits on demand even though payment was resisted in good faith and upon reasonable grounds. Life & Casualty Ins. Co. v. McCray, 291 U.S. 566 (1934). Awarding attorneys' fees

under civil rights legislation has been specifically upheld. Maher v. Gagne, 448 U.S. 122 (1980). Cf. Bankers Life & Casualty Co. v. Crenshaw, __ U.S. __, 108 S. Ct. 1645 (1988) (sustaining 15% statutory penalty imposed on losing appellant against equal protection attack, and favorably citing Life & Casualty Ins. Co. v. McCray, supra).

III. GROUP W's "GOOD FAITH" DOES NOT RELIEVE IT OF LIABILITY FOR FEES

Group W's position that it is immune from liability for counsel fees because it was "found" to have acted in "good faith" by the Court of Appeals is totally unsustainable. First, the Court of Appeals' "finding" pertained to an entirely different issue and cannot fairly be extended to the question of liability for attorneys' fees. Second,

under Section 1988, good faith, or its absence, is utterly irrelevant.

The "good faith" issue arose in the context of whether Group W could avail itself of Section 828 procedures when it had made its installations -- i.e. had already taken private property -- without making prior compensation. Petitioner had asserted that failure of a private entity exercising condemnation powers to compensate in advance casts its action outside of the statutory taking license and renders Group W subject to damages for trespass. In response, the Court of Appeals, while recognizing that "advance payment or the provision of security for payment of compensation is the general rule when property is taken for a private use," nonetheless ruled that it would be inappropriate to apply that requirement

rigidly here because "TelePrompter has proceeded in good faith under a statutory license not conditioned upon the advance payment of or security for compensation . . .." (A68-A69).

While that "finding" may be supported by the mere circumstance that a statute existed which permitted installation without advance compensation or security, the "finding" was clearly not one of fact as no evidence on the issue had been submitted.* To say that Group W acted "in good faith" so as not to have forfeited the right to have just compensation determined by the Commission is a far cry from saying that it acted in such "good faith" as to be immune from liability for attorneys'

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*The Court of Appeals lacks power to make factual findings and may only review them in limited, inapplicable circumstances. CPLR § 5501(b).

fees in a Section 1983 action. The Court of Appeals simply did not address the latter issue.

More importantly, good faith is irrelevant under Section 1988. Indeed, Section 1988 was adopted precisely in order to overcome the ruling in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), that the common law precluded an award of attorneys' fees in the absence of special circumstances such as that defendant had acted in bad faith. See Gagne v. Maher, 594 F.2d 336, 339 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980).

IV. THE CITY AND STATE ARE LIABLE FOR FEES

A. Appellant Prevailed against the City and State

In arguing that Appellant did not prevail against the City and State be-

cause she sought no substantive relief against them (City Br. 30-34; A.G. Br. 4), those Respondents* present an additional issue worthy of this Court's review, namely whether a voluntarily intervening party which actively participates in the case but against which no substantive liability is sought, may be liable for attorneys' fees under Section 1988.

The meaning of the language in Kentucky v. Graham, 473 U.S. 159 (1985) -- to the effect that a prevailing plaintiff may not recover fees from a party against which it has not prevailed nor from a non-party -- requires clarification in the context of a case

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*It must be noted that the Attorney General's standing to pose anything but jurisdictional issues is at best doubtful. At the trial court level, the Attorney General defaulted on the fee motion.

where fees are sought against voluntary intervenors whose participation has increased the burden on plaintiff. That issue was not addressed by Kentucky v. Graham.

The Seventh Circuit, however, has faced the intervenor issue squarely and determined that Kentucky v. Graham does not preclude an award of attorneys' fees under Section 1988 against intervenors because their "presence in the lawsuit was both voluntary and self-initiated." Charles v. Daley, 846 F.2d 1057, 1067 (7th Cir. 1988).

Only one of the cases the City and State cite even remotely bears on the intervenor issue, and then only in dictum. Kelley v. Metropolitan County Board of Education, 773 F.2d 677, 684-685 (6th Cir. 1985) (en banc), cert. denied, 474 U.S. 1083 (1986) (plaintiff

may not recover fees from defendant Board for costs of opposing unnamed intervenors and would not have been able to recover fees from the intervenors had it chosen to try to do so).

In contrast to the dictum in Kelley, fees have been awarded under Section 1988 in other (pre-Kentucky v. Graham) cases against intervenors even though they were not subject to substantive liability. Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979) (distinguished in Kelley on the ground that the intervenor in Haycraft obstructed the litigation, even if in good faith); Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 460 F. Supp. 1054 (E.D. Wis. 1978) (State liable for attorneys' fees where it intervened to support constitutionality of State statute); Vulcan Society of Westchester

County, Inc. v. Fire Dep't, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982); Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268, 1273 (N.D. Ohio 1984). See Moten v. Bricklayers, Masons and Plasterers Int'l Union, 543 F.2d 224, 239 (D.C. Cir. 1976) (fees imposed against participant which failed to qualify as intervenor).

Liability of the City and State for fees would also depend on Petitioner having "prevailed" against them. Charles v. Daley, supra, held that the mere fact that plaintiff defeated the position advanced by the intervenors constituted "prevailing" as to them even though no substantive liability was imposed against them on the merits. Furthermore, in light of this Court's reversal of the New York decisions that the State's Executive Law § 828 did not

effect a taking, the consequence that the State Cable Television Commission is now required to award just compensation where it had not been before, and the invalidation of the State Commission's 60-day statute of limitations, the Attorney General's contention that no substantive relief was granted against the State (A.G. Br. 4) is simply untenable.

B. The State Lacks Immunity

This Court has held that, by adopting the Fourteenth Amendment, the States abrogated their sovereign immunity as to Fourteenth Amendment (including Civil Rights Act) issues; implicitly, a State may be held liable for attorneys' fees under the Civil Rights Act. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Kentucky v. Graham, supra, indeed does hold that fees cannot be obtained against the State on a respondeat superior theory where its officers, acting beyond the scope of their authority, have incurred Civil Rights Act liability. But, here, the Attorney General acted well within his express legislative authority to intervene in support of the constitutionality of State laws (Executive Law § 71), this Court granted substantive relief against the State (not its officers) in determining that Section 828 effected a taking, and the Court of Appeals invalidated the State Commission's statute of limitations.

V. THE ORDERS APPEALED FROM ARE FINAL

The City argues unpersuasively that the orders below are not "final" because Appellant could pursue an administrative

remedy for "just compensation" and, depending on her success in that endeavor (including, presumably, exhaustion of all available appeals), she might renew her application for counsel fees some years hence. (City Br. 22-24).

A State court decision is "final" for Supreme Court jurisdictional purposes if no further proceeding will affect the federal claim, further proceedings are unlikely to raise additional federal claims, or immediate review would be the best way to avoid economic waste and delayed justice. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 ff. (1975); Florida v. Meyers, 466 U.S. 380 (1984). Here, no further proceedings can alter the federal issue the case presents: whether, upon finally prevailing on the liability issue, where

only damages remain to be determined and, then, only through an entirely independent administrative proceeding, fees are presently awardable either on a final or interim basis. As in Florida v. Meyers, further State proceedings might moot the federal issue presented here if they result in an award of fees some years from now, but no further State proceedings can change or sharpen the federal issue. The case falls squarely within two of the four categories described by this Court in Cox Broadcasting Corp. v. Cohn, supra -- further State proceedings would render the federal issues moot or there would be a serious erosion of federal policy or untoward delay in its effectuation if there were a refusal to review.

Contrary to the City's speculation, the reason Appellant did not appeal in

the State court system on constitutional grounds was that the issue below was not constitutional. CPLR § 5601(b). In any event, it hardly follows that the test of appealability in State court procedure is determinative of the jurisdiction of this Court. Nor would it be appropriate to speculate, as the City suggests this Court do, that the Court of Appeals exercised its discretionary right to deny leave to appeal on the ground that the orders below were not final.

VI. CONSIDERATION OF THE SUFFICIENCY OF THE FEE APPLICATION IS INAPPROPRIATE

The City's grabbag of alleged insufficiencies in Appellant's fee application (City Br. 34-37) should not be considered. They were not addressed by the Courts below as the fee application

was denied for other reasons. For the most part, the alleged insufficiencies (which are, in any event non-existent) could be easily dealt with through a hearing.

The City's contention that the fee application was tardily submitted (City Br. 34-35) should be denied out of hand. The City never raised this point below. Moreover, the City never offered any evidence that it had been prejudiced by any delay, as it must to succeed on a claim of laches. Baird v. Bellotti, 724 F.2d 1032 (1st Cir.), cert. denied, 467 U.S. 1227 (1984).

Respectfully submitted,

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